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No. 90-1032

Supreme Court, U.S.
FILED
DEC 28 1990
SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the courts below: Ronald Chisom; Marie Bookman; Walter Willard; Marc Morial; Henry Dillon III; the Louisiana Voter Registration/Education Crusade; Edwin Edwards, in his capacity as Governor of the State of Louisiana; W. Fox McKeithen, in his capacity as Secretary of State of the State of Louisiana; Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana; Pascal F. Calogero, Jr.; and Walter F. Marcus, Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (90-757 Pet. App. 1a-3a)[1] is reported at 917 F.2d 187. The opinion of the district court (excerpted at Pet. App. 4a-64a) is not reported. An earlier opinion of the court of appeals is reported at 839 F.2d 1056. An earlier opinion of the district court is reported at 659 F. Supp. 183.

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[1] The petition appendix in No. 90-757 contains the materials required by this Court's Rule 14.1(k). Unless otherwise noted, we will hereafter use the term "Pet. App." to refer to the petition appendix in No. 90-757.

The panel opinion of the court of appeals in the related case of *League of United Latin American Citizens Council No. 4434* v. *Mattox* is reported at 902 F.2d 293. The en banc decision of the court of appeals in that case is reported at 914 F.2d 620 and is reprinted in the appendix to the petition (at 1a-182a) in No. 90-813.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected

to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

1. Louisiana elects its seven justices to the state supreme court from six judicial districts for ten-year terms. The First District, which includes Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, elects two justices at-large. Each of the other five districts elects one justice. Pet. App. 7a-8a.

In September 1986, plaintiffs Ronald Chisom *et al.*, black registered voters in Orleans Parish, Louisiana, filed a complaint, alleging that the system for electing two state supreme court justices from the First Judicial District in at-large elections had the purpose and the effect of diluting black voting strength, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, the Equal Protection Clause of the Fourteenth Amendment, and the Fifteenth Amendment.[2] The plaintiffs alleged that the elections in the First District, in which a majority of the population and registered voters are white, had been marked by racial bloc voting and other effects of past official discrimination; that few blacks had been elected to public offices in the district; that there was no justifiable basis for singling out the First District for multi-member elections; and that the First District could be divided into two districts, each of which, like the remaining judicial districts, would elect one justice. The plaintiffs ar-

[2] The plaintiffs have filed a petition for writ of certiorari in this case as well, No. 90-757.

gued that an appropriate division along parish lines would produce one district—Orleans Parish—in which a majority of the population and registered voters would be black. Pet. App. 4a-6a.

2. The district court dismissed the complaint, holding that Section 2 of the Voting Rights Act of 1965 did not apply to judicial elections. *Chisom* v. *Edwards*, 659 F. Supp. 183 (E.D. La. 1987). The court found that Section 2, by its terms, is violated only when minority voters prove that they lack an equal opportunity "to elect representatives of their choice." Section 2 therefore does not apply to judicial elections, the court held, since judges are not "representatives." 659 F. Supp. at 185-187.[3]

3. Plaintiffs appealed and the court of appeals reversed, holding that Section 2 applies to judicial elections. *Chisom* v. *Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom I*). The court stated that the original language of Section 2, enacted in 1965, prohibited discrimination in any "voting qualification or prerequisite to voting, or standard, practice or procedure," and that Section 14(c)(1) of the Act, 42 U.S.C. 1973*l*(c)(1), defined voting as applying to "any primary, special, or general election * * * with respect to candidates for public or party office and propositions for which votes are received in an election," demonstrating Congress's intent to prohibit a broad range of discriminatory electoral practices.

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[3] The district court also dismissed the plaintiffs' claims under the Fourteenth and Fifteenth Amendments, on the ground that the plaintiffs had not adequately alleged intent to discriminate. 659 F. Supp. at 187-189. The court of appeals reversed and reinstated those claims, *Chisom* v. *Edwards*, 839 F.2d 1056, 1064-1065 (5th Cir. 1988), but after trial the district court held that the plaintiffs had not proved intentional discrimination, Pet. App. 63a-64a. Those claims are no longer at issue.

839 F.2d at 1059-1060. Because judges are "candidates for public or party office," the court held that the 1982 amendments to Section 2, which added the term "representatives" on which the district court relied, still applied to judicial elections. The 1982 amendments, the court concluded, did not limit the Act's coverage, but instead enacted the "results" test that this Court had rejected in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). 839 F.2d at 1059-1061. The court of appeals rejected the district court's reliance on the line of "one person, one vote" cases holding that judges are not representatives, on the ground that cases involving racial discrimination are not governed by the same considerations as cases involving nonracial reapportionment. *Id.* at 1060-1061.

The court also found relevant some secondary sources of congressional intent. For example, the court saw some indication in the legislative history of the 1982 Voting Rights Act amendments that Congress understood Section 2 to apply to judicial elections. 839 F.2d at 1061-1063. The court found relevant the holding in *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), summarily aff'd mem., 477 U.S. 901 (1986), that Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which requires preclearance of changes in electoral procedures in some States and which has coverage language nearly identical to that of Section 2, applies to judicial elections. 839 F.2d at 1063-1064. Finally, the court noted that the Attorney General has consistently interpreted the Voting Rights Act as covering judicial elections. *Id.* at 1064.

The defendants sought review in this Court, which denied certiorari *sub. nom. Roemer* v. *Chisom*, 488 U.S. 955 (1988).

4. After trial,[4] the district court held that the plaintiffs had failed to prove a violation of Section 2 under the standards set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Specifically, the court held that plaintiffs had failed to prove that black voters are geographically compact or politically cohesive, or that there was significant racial bloc voting. Pet. App. 16a-62a.

5. The plaintiffs and the United States appealed, claiming that the district court's factual findings were clearly erroneous. Before the appeal was decided, however, the Fifth Circuit, sitting en banc, decided *League of United Latin American Citizens Council No. 4434* (*LULAC*) v. *Clements*, 914 F.2d 620 (1990) (*reprinted at* 90-813 Pet. App. 1a-182a). The plaintiffs in *LULAC* alleged that the at-large election of trial judges in nine Texas counties diluted the ability of minority populations in each county to elect candidates of their choice, in violation of Section 2. In *LULAC*, the en banc Fifth Circuit, by a 7-6 vote, held that the Section 2 vote dilution test does not apply to the election of judges, and expressly overruled *Chisom I*.

The majority held that while Section 2 generally applies to judicial elections the vote dilution test of Section 2(b) does not, since judges are not "representatives" under Section 2(b) or as a general matter. *LULAC*, 914 F.2d at 625-627. As support for its interpretation, the majority pointed out that the concept of minority vote dilution was modeled on the vote dilution standards developed in "one-person, one-vote" cases, *id.* at 627-628, and that by 1982 at least

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[4] The United States intervened in the district court after the remand for trial. The United States had participated in the earlier stages of the litigation as an amicus curiae.

15 federal court decisions, including a decision by this Court—*Wells* v. *Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), summarily aff'd mem., 409 U.S. 1095 (1973)—had ruled that "the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections," 914 F.2d at 626; *id.* at 626 n.9. Applying the canon of construction that Congress is presumed to be aware of and endorse "the uniform construction" placed on a term, the majority determined that Congress used the term "representative" in order to apply the new results test of Section 2 to elections for representative, political offices but not to vote dilution claims in judicial contests. *Id.* at 628-629. The majority found unpersuasive the fact that the definitional provision of the Act, 42 U.S.C. 1973*l*(c)(1), defined "voting" by reference to "candidates for public or party office," because the term "representative" in Section 2 was more specific. *LULAC*, 914 F.2d at 629. Because Section 5 of the Voting Rights Act does not use the word "representatives," the majority also found irrelevant the fact that Section 5 applies to judicial elections. *Ibid.*

Six members of the en banc court, in three separate opinions, concluded that the dilution test of Section 2 applies to judicial elections. Judge Higginbotham, joined by three other judges, concluded that the term "representatives" encompasses elected judges. *LULAC*, 914 F.2d at 635-645. He nevertheless concluded that the at-large election of trial judges in Texas does not violate Section 2 since each trial judge, like each governor, occupies a so-called "single-person office" whose electorate cannot be further subdivided. In such instances, he said, electing all trial

judges on an at-large basis does not dilute minority voting strength. *Id.* at 645-651. Concurring specially, Chief Judge Clark said that he agreed with Judge Higginbotham, adding that vote dilution analysis might be appropriate when a State elects its judges from single-member districts. *Id.* at 631-634. Judge Johnson dissented. In his view, the Section 2(b) vote dilution test applies to judicial elections, and the "single-person office" exception did not apply in the *LULAC* setting, because at the trial court level there were multiple officeholders. 914 F.2d at 651-671.

6. Thereafter, the court of appeals issued a per curiam opinion in this case. Relying on *LULAC*, the court remanded this case to the district court with directions to dismiss the Voting Rights Act claims for failure to state a claim upon which relief could be granted. Pet. App. 1a-3a.

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided a question of considerable public importance in a manner that expressly conflicts with a decision of another court of appeals. By holding that the vote dilution test of Section 2(b) of the Voting Rights Act of 1965 does not apply to the election of judges, the court of appeals has erroneously exempted a significant category of elections from the broadly worded text of that law. By single-mindedly focusing on the term "representatives," the court of appeals construed Section 2 in a manner that is in tension with this Court's interpretation of Section 5 of the Act, and contrary to the broad remedial purposes underlying the 1982 amendments to Section 2. Moreover, the question presented will recur with regularity since a majority of the States elect at least some

judges at the trial or appellate levels. Accordingly, review by this Court is clearly warranted.

1. The Fifth Circuit's decisions in this case and in *LULAC* directly conflict with the Sixth Circuit's decision in *Mallory* v. *Eyrich*, 839 F.2d 275 (1988).[5] In *Mallory*, the Sixth Circuit held that the Section 2 vote dilution test applies to the election of municipal judges, expressly rejecting the argument that judges are not "representatives" within the meaning of Section 2. In fact, the Sixth Circuit's analysis in *Mallory* of the Section 2 question was identical to the Fifth Circuit's analysis of the same issue in *Chisom I*, which that court overuled in *LULAC*. Compare *Mallory*, 839 F.2d at 277-281, with *Chisom I*, 839 F.2d at 1059-1064. This square conflict between the Fifth and Sixth Circuits warrants review by this Court.

2. The question presented is of sufficient national importance and will recur with a sufficient degree of regularity that review is warranted. Forty-one States elect some or all of their judges, see *The American Bench* (M. Hough 4th ed. 1987-1988), and suits have been filed in ten States alleging that the election of judges dilutes minority voting strength in violation of Section 2. 90-757 Pet. 14-15. Resolution of this question is therefore of substantial interest to the United States, which has primary responsibility for enforcing Section 2. In addition, the Attorney Gen-

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[5] District courts in the Seventh and Eleventh Circuits have also held that the Section 2 vote dilution test applies to judicial elections. *Williams* v. *State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988); *SCLC* v. *Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989). The district court in *Siegelman* recently reaffirmed its earlier decision and noted its disagreement with *LULAC*. *SCLC* v. *Siegelman*, No. 88-D-462-N (Dec. 5, 1990).

eral is responsible under Section 5 for reviewing voting changes, and must withhold preclearance if he concludes such action "is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55 (b)(2). A decision that Section 2's dilution standard does not apply to judicial elections thus affects the manner in which the government reviews proposed voting changes in judicial election procedures under Section 5.

3. The Fifth Circuit in *LULAC* erred in ruling that the vote dilution test of Section 2 does not apply to judicial elections. Congress enacted the Voting Rights Act of 1965 in order to "rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 365 (1966). The original text of Section 2 stated that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the rights of any citizen of the United States to vote on account of race or color." The 1965 Act defined the term "voting" as "any primary, special, or general election * * * with respect to candidates for public or party office * * *." 42 U.S.C. 1973*l*(c)(1) (1976). That definition was sufficiently broad to encompass elections of any type for any office, including elections for judges. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969) (Congress intended "to give the Act the broadest possible scope"). A candidate who stands in a primary or in the general election for a position on the state supreme court easily fits within that definition. Thus, it is clear that the elections at issue here were covered by the original version of Section 2.

The 1982 amendments to Section 2 did not change that result. Congress did not amend Section 2 to

shorten the reach of that law; instead, Congress amended Section 2 in order to enact the "results" test that this Court had rejected in *City of Mobile* v. *Bolden*, *supra*. See *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986). Congress accomplished that result by dividing Section 2 into two parts, adding to subsection (a) the term "results," and defining the new results test in subsection (b). At the same time, Congress did not alter that portion of the text of Section 2 defining the reach of the law (*i.e.*, the language referring to "[n]o voting qualification", etc.). Thus, subsection (a), like its predecessor, the 1965 version of the Act, encompasses elections of every stripe; nothing excludes judicial elections.

In reaching the contrary result, the Fifth Circuit relied heavily on Congress's use of the term "representatives" in subsection (b). This was mistaken. Congress patterned the phrasing of the results test in subsection (b) after a passage in *White* v. *Regester*, 412 U.S. 755 (1973). *White* involved a challenge to the election of state legislators, and the relevant passage focused on whether minority voters "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766. Congress incorporated that principle into subsection (b), but substituted the term "representatives" for "legislators." Although use of the term "legislators" would not have included judges, the term "representative" does not necessarily exclude them. Because nothing in the legislative history of the 1982 amendments indicates that the election of judges is excluded from the scope of Section 2 (in fact, there is some evidence

that Congress knew that Section 2 applied to such elections [6]), the Court can give the term "representative" the natural interpretation that the facts of this case show to be reasonable.

The Fifth Circuit's decisions in this case and *LULAC* create an anomaly in the application of Sections 2 and 5 of the Voting Rights Act. This Court has twice held that the Section 5 preclearance requirements apply to judicial elections, *Martin* v. *Haith*, 477 U.S. 901 (1986); *Brooks* v. *Georgia State Bd. of Elections*, 111 S. Ct. 13 (1990), but the Fifth Circuit has now ruled that the vote dilution analysis of Section 2 does not apply. The Fifth Circuit's decisions lead to the "incongruous result," as Judge Higginbotham noted in *LULAC*, 914 F.2d at 645, that a covered State cannot implement a discriminatory voting procedure, but an existing discriminatory procedure cannot be challenged under the very law

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[6] The House and Senate hearings contain various references to judicial elections, principally in the context of statistics indicating the progress made by minorities under the Act up to 1982. See, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1535, 1745, 1839, 2647 (1981); and *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 669, 748, 788-789 (1982). The majority in *LULAC* dismissed the significance of these references, 914 F.2d at 629-630, but the importance of those references is not that they resolved the issue presented here. Instead, they show that some members of Congress knew in 1982 that many state judges were elected, yet no one suggested that the Act should be redrafted to exclude judicial elections.

Congress intended to be used as the vehicle to redress such illegality.

The majority in *LULAC* erred in relying on the line of cases holding, in the reapportionment context, that judges do not have a "representative" function. Section 2 did not codify the "one-person, one-vote" inquiry; rather, it sought to ensure that minority votes are not cancelled out by means of dilutive electoral systems. For that reason, there is no requirement that the term "representative" be read to exclude judges.

4. As noted above, the plaintiffs in this case have filed a certiorari petition seeking review of the judgment below, *Chisom* v. *Roemer*, No. 90-757. In addition, the plaintiffs in *LULAC* have also filed a certiorari petition seeking review of the Fifth Circuit's judgment there. *Houston Lawyers' Ass'n* v. *Mattox*, No. 90-813. This case involves the election of appellate judges on a district-by-district basis, while *LULAC* involves the at-large election of trial judges. The *LULAC* case also involves a question not presented in this case, namely, whether the "single member office" exception applies to the election of Texas trial court judges. This case and *LULAC*, taken together, afford the Court an opportunity to consider whether Section 2 applies to judicial elections in a complete factual context. For that reason, we urge the Court to grant all three petitions, to consolidate for argument our petition in this case with the petition filed by the private plaintiffs in No. 90-757, and to set this case for oral argument in tandem with the petition in No. 90-813. (Petitioners in No. 90-757 and in *Houston Lawyers' Ass'n* v. *Mattox*,

No. 90-813, have also urged the Court to grant review in both cases.)[7]

CONCLUSION

The petition for a writ of certiorari should be granted. The petition in *Chisom* v. *Roemer*, No. 90-757, should also be granted, and it should be consolidated for oral argument with this petition. In addition, the petition in *Houston Lawyers' Ass'n* v. *Mattox*, No. 90-813, should be granted, and that case should be heard in tandem with this case and No. 90-757.

Respectfully submitted.

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DECEMBER 1990

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[7] Petitioners in *Clark* v. *Roemer*, No. 90-898, have filed a petition for a writ of certiorari before judgment to the Fifth Circuit. That case involves trial level judges and one appellate district in Louisiana. That case, however, adds nothing to the factual scenarios presented by *Chisom* and *LULAC*, so separate review is not called for in that case.

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